IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES, *Petitioners*

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations, *Respondents*

**On Petition for Certiorari From the United States Court of Appeals for the Eighth Circuit**

## BRIEF AMICUS CURIAE, URGING REVERSAL ON BEHALF OF—

THE NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE;
GEORGE J. GOTTWALD, Administrator, Archdiocese of St. Louis;
LAWRENCE CARDINAL SHEHAN, Archbishop of Baltimore;
PATRICK CARDINAL O'BOYLE, Archbishop of Washington, D.C.;
FLOYD L. BEGIN, Bishop of Oakland;
WILLIAM G. CONNARE, Bishop of Greensburg;
HUGH A. DONOHOE, Bishop of Stockton;
JOHN A. DONOVAN, Bishop of Toledo;

(See inside cover for counsel)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| Interest of Amici Curiae | 2 |
| Summary Statement of the Case | 4 |
| Additional Questions Presented | 6 |
| Argument | 7 |
| I. Freedom to Purchase a Home Without Discrimination on Account of Race Is a Natural, or Human, Right | 7 |
| 1. Racial Isolation in the American Community | 7 |
| 2. The Right Here Involved | 10 |
| II. Freedom to Purchase a House Without Discrimination on Account of Race Is a Liberty Protectable Under the Fourteenth Amendment | 14 |
| III. Freedom to Purchase a Home Without Discrimination on Account of Race Is a Fundamental Right of Citizens Guaranteed by the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment | 17 |
| IV. Freedom to Purchase a Home Without Discrimination on Account of Race Is a Fundamental Right Within the Meaning of the Ninth Amendment | 18 |
| V. Freedom to Purchase a Home Without Discrimination on Account of Race Is Protected Under the Thirteenth Amendment | 19 |
| Conclusion | 22 |


## CITATIONS

CASES:


| | |
|---|---|
| Bolling v. Sharpe, 347 U.S. 497 (1954) | 15, 16 |
| Brown v. Board of Education, 347 U.S. 483 (1954) | 19 |
| Campbell v. Morris, 3 Harr. & McHen. 535 (1797) | 17 |
| Civil Rights Cases, 109 U.S. 3 (1883) | 19 |
| Clyatt v. United States, 197 U.S. 207 (1904) | 19 |
| Corfield v. Coryell, 4 Wash. C.C. 371 (1923) | 17 |
| Evans v. Newtown, 382 U.S. 296 (1966) | 15 |
| Griswold v. Connecticut, 381 U.S. 479 (1965) | 18 |
| Heart of Atlanta Motel v. United States, 379 U.S. 291 (1964) | 9 |
| James v. Marinship Corp., 25 Cal. 2d 721 (1944) | 16 |
| Kent v. Dulles, 357 U.S. 116 (1958) | 18 |

Index Continued iii

Marbury v. Madison, 1 Cranch 137 (1803) ..... 16
Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868) ..... 17
Plessy v. Ferguson, 163 U.S. 537 (1896) .....19, 20, 21
Shelley v. Kraemer, 334 U.S. 1 (1948) ..... 15
United States v. Morris, 125 F. 322 (1903) ..... 21
Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1793) ..... 13

STATUTES:

42 U.S.C. § 1982 .....6, 14, 19

CONGRESSIONAL DEBATES:

39th Cong., 1st Sess. (Jan. 19, 1866) S. p. 322 ..... 20
39th Cong., 1st Sess. (Feb. 1, 1866) H. p. 589 ..... 21
39th Cong., 1st Sess. (Mar. 2, 1866) H. p. 1159 ..... 21

TEXTS:

ANTIEAU, Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clauses of Article Four, 2 W.&M.L.R. 1 (1967) ..... 17
Bureau of Census, Department of Commerce, STATISTICAL ABSTRACT, U.S., 1967 SEPT. ..... 8
CLARKE, PREJUDICE AND YOUR CHILD (1955) ..... 10
Commission on Race and Housing, WHERE SHALL WE LIVE? (1958) ..... 8
IRELAN, LOW INCOME LIFE STYLES (1966) ..... 9
MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW (1943) 10
MCINTIRE, RESIDENCE AND RACE (1960) ..... 8
MOYNIHAN, THE NEGRO FAMILY—THE CASE FOR NATIONAL ACTION (1966) ..... 8
POPE JOHN XXIII, MATER ET MAGISTRA (1961) .....12, 13
POPE JOHN XXIII, PACEM IN TERRIS (1964) .....11, 12
TAEUBER, NEGROES IN CITIES (1965) ..... 9
U.S. Commission on Civil Rights, I, II, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1965) ..... 8
U.S. Commission on Civil Rights, A TIME TO LISTEN AND A TIME TO ACT (1967) ..... 10
U.S. Department of Health, Education, and Welfare, HEALTH, EDUCATION, AND WELFARE INDICATORS (Feb.-Oct., 1965) ..... 8
Vatican Council II, *Pastoral Constitution on the Church in the Modern World* (1964) ..... 4
WOLFGANG, CRIME AND RACE (1964) ..... 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

---

No. 645

---

JOSEPH LEE JONES AND BARBARA JO JONES, *Petitioners*

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations, *Respondents*

---

**On Petition for Certiorari From the United States Court of Appeals for the Eighth Circuit**

---

## BRIEF AMICUS CURIAE.* URGING REVERSAL. ON BEHALF OF—

THE NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE;
GEORGE J. GOTTWALD, Administrator, Archdiocese of St. Louis;
LAWRENCE CARDINAL SHEHAN, Archbishop of Baltimore;
PATRICK CARDINAL O'BOYLE, Archbishop of Washington, D.C.;
FLOYD L. BEGIN, Bishop of Oakland;

---

* Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of Respondents' counsel to the filing of this Brief Amicus Curiae.

WILLIAM G. CONNARE, Bishop of Greensburg;
HUGH A. DONOHOE, Bishop of Stockton;
JOHN A. DONOVAN, Bishop of Toledo;
JOSEPH A. DURICK, Administrator, Diocese of Nashville;
RAYMOND J. GALLAGHER, Bishop of Lafayette-in-Indiana;
PAUL J. HALLINAN, Archbishop of Atlanta;
CHARLES H. HELMSING, Bishop of Kansas City-St. Joseph;
JOSEPH H. HODGES, Bishop of Wheeling;
ROBERT E. LUCEY, Archbishop of San Antonio;
JOHN J. MAGUIRE, Administrator, Archdiocese of New York;
JOSEPH M. MARLING, Bishop of Jefferson City;
JOSEPH McSHEA, Bishop of Allentown;
RUSSELL J. McVINNEY, Bishop of Providence;
JOHN L. MORKOVSKY, Administrator, Diocese of Galveston-Houston;
VICTOR J. REED, Bishop of Oklahoma City and Tulsa;
JOHN J. RUSSELL, Bishop of Richmond;
FULTON J. SHEEN, Bishop of Rochester;
IGNATIUS J. STRECKER, Bishop of Springfield-Cape Girardeau;
ERNEST L. UNTERKOEFLER, Bishop of Charleston; and
JOHN J. WRIGHT, Bishop of Pittsburgh.

## INTEREST OF AMICI CURIAE

This brief is submitted on behalf of The National Catholic Conference for Interracial Justice and the following Roman Catholic bishops:

George J. Gottwald, Administrator, Archdiocese of St. Louis, Missouri;

Lawrence Cardinal Shehan, Archbishop of Baltimore, Maryland;

Patrick Cardinal O'Boyle, Archbishop of Washington, D.C.;

Floyd L. Begin, Bishop of Oakland, California;

William G. Connare, Bishop of Greesburg, Pennsylvania;

Hugh A. Donohoe, Bishop of Stockton, California;

John A. Donovan, Bishop of Toledo, Ohio;

Joseph A. Durick, Administrator, Diocese of Nashville, Tennessee;

Raymond J. Gallagher, Bishop of Lafayette-in-Indiana;

Paul J. Hallinan, Archbishop of Atlanta, Georgia;

Charles H. Helmsing, Bishop of Kansas City-St. Joseph, Missouri;

Joseph H. Hodges, Bishop of Wheeling, West Virginia;

Robert E. Lucey, Archbishop of San Antonio, Texas;

John J. Maguire, Administrator, Archdiocese of New York;

Joseph M. Marling, Bishop of Jefferson City, Missouri;

Joseph McShea, Bishop of Allentown, Pennsylvania;

Russell J. McVinney, Bishop of Providence, Rhode Island;

John L. Morkovsky, Administrator, Diocese of Galveston-Houston, Texas;

Victor J. Reed, Bishop of Oklahoma City and Tulsa, Oklahoma;

John J. Russell, Bishop of Richmond, Virginia;

Fulton J. Sheen, Bishop of Rochester, New York;

Ignatius J. Strecker, Bishop of Springfield-Cape Girardeau, Missouri;

Ernest L. Unterkoefler, Bishop of Charleston, South Carolina; and

John J. Wright, Bishop of Pittsburgh, Pennsylvania.

The National Catholic Conference for Interracial Justice, a non-profit corporation, was organized in 1960, and is an agency which serves nearly 150 human relations and urban organizations throughout the United States. The Conference works to end racial discrimination and prejudice, and to foster interracial justice in all areas of life.

The individuals are bishops of the Roman Catholic Church. As pastors of their respective dioceses, they are committed to the proposition that "with regard to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent." (Vatican Council II, *Pastoral Constitution on the Church in the Modern World.*)

## SUMMARY STATEMENT OF THE CASE

Petitioners Joseph Lee Jones and Barbara Jo Jones, husband and wife, citizens of the United States and of the State of Missouri, in June, 1965, were looking for a new home and, responding to an advertisement in the *St. Louis Post-Dispatch,* went to Paddock Woods, a real estate subdivision, owned and developed by respondents. Petitioners determined that a certain style of house suited their needs and resources and was reasonably accessible to their places of employment as federal employees. They selected a house and lot in Paddock Woods which they then sought to purchase from respondents. The respondents refused to sell them the house and lot because Joseph Lee Jones is a Negro, and because it is the respondents' policy not to sell the said houses and lots to Negroes. The record does not disclose the existence of any state or local "open housing" statute or ordinance.

Paddock Woods is projected as a large suburban community. While respondents have not been the recipients of state or federal grants, loans or other monetary assistance in establishing this community, the Paddock Woods development is nevertheless clothed with the following incidents of municipal character:

a. Developers, the respondents, enjoy the privileges and protections of various state and local laws (*e.g.*, incorporation, licensing, etc.)

b. They are required to render effective on a community-wide basis, numerous state and local laws (*e.g.*, zoning ordinances, building codes, etc.)

c. They afford a number of municipal services and facilities (*e.g.*, streets, access to utilities, golf course).

Petitioners brought an action in the United States District Court for the Eastern District of Missouri, to recover damages and for injunctive relief. The District Court entered judgment denying the relief sought, 255 F. Supp. 115, and petitioners appealed. The United States Court of Appeals for the Eighth Circuit on June 26, 1967, affirmed, holding that the respondent owners of homes in Paddock Woods, which were on the market for sale and which were built without federal or state monetary assistance, were not precluded by civil rights statutes or by the Thirteenth or Fourteenth Amendments to the federal constitution from refusing to sell a home to a person, willing and able to buy the same, on the ground that such person is a Negro. 379 F. 2d 33. Petitioners then prayed that the Supreme Court of the United States issue a writ of certiorari to United States Court of Appeals for the Eighth Circuit to review its said judgment.

The petition for certiorari was granted December 4, 1967.

The *amici curiae* submitting this brief concur in the arguments presented by petitioners to this Court, arguing in particular that this case should be held governed by the provisions of Section 1982 of Title 42, of the Civil Rights Act of 1866. It is the belief of the *amici* that petitioners' brief deals adequately both with that issue and with the alternative issue of whether there was "state action", in the premises, entitling petitioners validly to assert a denial of equal protection of the laws under the Fourteenth Amendment.

The special purpose which the *amici* believe that their brief may serve is to present argument that there is a constitutional right to purchase a home without discrimination on account of race, such right being grounded not upon social convenience but upon antecedent moral rights deriving from the nature of man. Representing religious leadership of one religious body in the American community, the *amici* seek to stress teaching of their Church relating to these moral rights.

## ADDITIONAL QUESTIONS PRESENTED

The *amici curiae* desire to bring to the attention of this Court the following four questions:

1. Whether freedom to purchase a home without discrimination on account of race is a liberty guaranteed by the due process clause of the Fourteenth Amendment.
2. Whether freedom to purchase a home without discrimination on account of race is a fundamental right of citizens guaranteed by the privileges and immunities clauses of Article Four of the Fourteenth Amendment.

3. Whether freedom to purchase a home without discrimination on account of race is a fundamental right within the meaning of the Ninth Amendment.

4. Whether freedom to purchase a home without discrimination on account of race is protected under the Thirteenth Amendment.

Common to each of these questions is the issue of whether such freedom of purchase is, or should in this day, be recognized to be, a fundamental, or "natural" *, right belonging to petitioners as human beings. become "the slave of society." 39th Cong., 1st Sess.

## ARGUMENT

### I. Freedom To Purchase a Home Without Discrimination on Account of Race Is a Natural or Human Right.

*1. Racial isolation in the American community.* The increasingly marked insistence by religious leaders upon what they say is the "injustice" or "immorality" of racial isolation in housing is not an abstraction but is a moral judgment deriving from observation of actual conditions in our society. The effect of such isolation may be seen (a) in terms of the personal lives of the isolated (b) in terms of the community. Racial segregation in dwelling, whether maintained by law or by commercial or other widespread private practice, becomes a community problem because of its intensive impact upon individual lives. In the most intimate area of human existence—the daily living that goes

* As will appear, the term, "natural", herein is not meant to import the individualistic "natural law" concepts found in Locke, the *laissez faire* "natural law" of Adam Smith, or the "natural law" of those who argue that racial segregation derives "naturally" from racial differences found in the order of creation.

on in one's place of dwelling—crowdedness[1] in characteristically poor quality housing,[2] and such factors as hazard to health[3], lack of privacy, danger to family life[4], and high incidence of crime and juvenile delinquency[5] today work extreme personal hardship upon millons of citizens who are confined *de facto* to racial compounds. Inseparably connected with the racial enclaves found in all large American cities is the perpetuation of poverty through severe restriction in job opportunity[6] and of ignorance and non-achievement through severe restriction in educational opportunity[7]. Perhaps the chief evil effect upon individuals of publicly or privately maintained racial isolation in housing are the outlooks on self and society which it, along with

---

[1] See Map 2, showing percent distribution of Negro population of St. Louis by census tract, 1950, in I RACIAL ISOLATION IN THE PUBLIC SCHOOLS (report of U.S. Commission on Civil Rights) 33 (1965).

[2] MCINTIRE, RESIDENCE AND RACE 155 (1960).

[3] In 1965 the national white maternal death rate was 21.0%. while that for non-whites was 83.7%; the fetal death rate for whites was 13.9%, while that for non-whites was 27.2%; the infant death rate for whites was 21.5%, while that for non-whites was 40.3%. STATISTICAL ABSTRACT, U.S., 1967, Sept. (Bureau of Census, Department of Commerce, 88th ed. (1967)). The rate of tuberculosis for whites in 1963 was 3.4%, while that of non-whites was 12.6%. HEALTH, EDUCATION, AND WELFARE INDICATORS, Feb.-Oct., 1965, 20.

[4] See generally MOYNIHAN, THE NEGRO FAMILY—THE CASE FOR NATIONAL ACTION (Office of Policy Planning and Research, U.S. Department of Labor (1966)).

[5] See generally, WOLFGANG, CRIME AND RACE (1964).

[6] See, IN SEARCH OF HOUSING, A STUDY OF EXPERIENCE OF NEGRO PROFESSIONAL AND TECHNICAL PERSONNEL IN NEW YORK STATE (1959).

[7] See, Report of Commission on Race and Housing, WHERE SHALL WE LIVE? 35, 36 (1958) and see, generally, I, II, RACIAL ISOLATION IN PUBLIC SCHOOLS (report of U.S. Commission on Civil Rights) (1965).

the foregoing intimately related factors, helps to generate: the sense of limited alternatives, helplessness, deprivation and insecurity common to the poor[8]. But in addition other attitudes—alienation, frustration and outrage, due peculiarly to the fact that the combination of afflictions is visited by others upon such individuals solely because of race—are inevitable.[9]

> "Discrimination . . . is the humiliation, frustration, and embarrassment that a person must feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues." [10]

Racial segregation in housing is an illness affecting the entire American community. The crime which is

---

[8] "In our society, a continuously low income is directly associated with certain life situations. Poorer, more crowded living quarters, reduced access to education and recreation, occupational restriction to simpler, manual types of work—these and similar characteristics of the very poor are sufficiently obvious to need no underlining. The result of these circumstances is a set of life conditions which is not so obvious. They consist of four general limitations: (1) comparative simplification of the experience world (2) powerlessness (3) deprivation, and (4) insecurity." IRELAN, LOW-INCOME LIFE STYLES (Welfare Administration Publication No. 14; U.S. Department of Health, Education, and Welfare) 1-2 (1966).

[9] That most housing discrimination in the United States is the result of racial discrimination appears open to little argument. The study of the Taeubers, NEGROES IN CITIES (1965) brings this point out clearly.

[10] Per Goldberg, J., concurring in Heart of Atlanta Motel v. United States, 379 U.S. 291-292 (1964), quoting Senate Report No. 872, 88 Cong., 2d Sess., 16.

nurtured by the racial compound becomes a bludgeon directed at the head of the whole community[11], and the mounting costs of court and correctional services divert public funds from uses in relief of poverty and ignorance into which they might otherwise be plowed. Failures of ghetto people in economic, family and civic life rot the entire social fabric[12]. But the greatest public harm which results from such segregation is that it is a direct and active negation of the idea of society itself, *i.e.*, a society of human persons[13].

*2. The right here involved.* If racial segregation in housing is damaging to human persons as human persons and to the society which they comprise, it may be surmised that practices which promote or maintain such segregation are violative of basic human right. While the freedom of purchase in question should be deemed self evident, the record of a century's conflict

---

[11] See, generally, A TIME TO LISTEN AND A TIME TO ACT (United States Commission on Civil Rights, 1967).

[12] See, CLARK, PREJUDICE AND YOUR CHILD (1955); U.S. Commission on Civil Rights, *1959 Report* 391, 392.

[13] "And the commonwealth, in so far as it deserves the name, is a society of persons . . . Society is a whole whose parts are themselves wholes, and it is an organism composed of liberties, not just vegetative cells. It has its own good and the work of the individuals who constitute it. But this good and this work are and must be essentially *human*, and consequently become perverted if they do not contribute to the development and improvement of human persons.

• • •

[The common good] is the good human life of the multitude, of a multitude of persons . . . The common good of society is their communion in the good life; it is therefore common *to the whole and to the parts*, to the parts, which are in themselves wholes, since the very notion of persons means totality." MARITIAN, THE RIGHTS OF MAN AND NATURAL LAW, 6-9 (1943).

respecting it invokes the need to discuss the nature of man and of property, and to relate such discussion to the freedom to purchase a home.

The Declaration of Independence speaks of man's endowment with the "unalienable" rights of life, liberty and the pursuit of happiness, thus establishing rights as inherent in the nature of man rather than as dependent upon social convenience (*e.g.,* improvement in the quality of the labor force) or as related solely to a particular benefit to an individual but not clearly related to his whole nature as man (*e.g.,* improvement in his learning skill). It is submitted that Christian teaching roots the freedom to purchase a home in firmer soil because of its expansive view of the nature and dignity of man and its view of rights of property not as autonomous but as always linked to man-in-society. In Christian teaching the human person has an *absolute* worth because created by, and intended for, God[14]. Out of this fact flow his rights and obligations[15]. In contemporary Catholic teaching, means which are suitable for the proper development of life are among such rights, including the right to shelter:

> "Beginning our discussion of the rights of man, we see that every man has the right to life, to bodily integrity, and to the means which are suitable for the proper development of life; these are primarily food, clothing, shelter, rest, medical care, and finally the necessary social services." [16]

---

[14] *Id.* at 4.

[15] PACEM IN TERRIS (encyclical of Pope John XXIII) 10 CATHOLIC LAW. 29 (1964).

[16] *Ibid.*

The encyclical, *Pacem in Terris,* relates the social and economic progress of citizens to housing[17] and to the individual's "right to freedom of movement and of residence within the confines of his own country."[18] It specifies related rights, such as the right to set up a family[19] and the right to an opportunity to work[20], both such rights being obviously related to housing. The encyclical, *Mater et Magistra,* likewise describes a "right" to housing[21].

Such broadly stated "right" is not in conflict with the right to property, as seen in Catholic teaching:

> "The right to private property, even of productive goods, also derives from the nature of man. This right, as We have elsewhere declared, *is an effective means for safeguarding the dignity of the human person and for the exercise of responsibility in all fields; it strengthens and gives serenity to family life, thereby increasing the peace and prosperity of the State."*[22] (Emphasis in original text.)

Again,

> "Private property . . . is a natural right possessed by all, which the State may by no means suppress. However, as there is from nature a social aspect to private property, he who uses his

---

[17] *Id.* at 38.

[18] *Id.* at 32.

[19] *Id.* at 30.

[20] *Id.* at 31.

[21] MATER ET MAGISTRA (encyclical of Pope John XIII, America Press ed., 1961).

[22] PACEM IN TERRIS, *ibid.*, at 31.

> right in this regard must take into account not merely his own welfare but that of others as well." [23]

From this it follows that both the rights of acquisition and of disposal of property are limited by considerations of the "welfare of others" and "safeguarding the dignity of the human person." American and English law have long emphasized the rights to acquire and to alienate property as basic liberties[24]. It has also long recognized that these rights are not absolute. What our law needs now to make clear is that, whatever freedoms and limitations otherwise inhere in the property right, neither the right to acquire or to dispose of property may be made to depend upon the race of the buyer or the seller, since the imposition of such a test is harmful to the "welfare of others" and destructive of "the dignity of the human person". Stated differently, the right is fundamental and complete, being limited only by factors reasonably demanded by the common good. Since, as has been seen, the common good is harmed, rather than advanced, through racial discrimination in the sale of housing, respondents' rights in selling ought to be deemed limited by the fact that they may not discriminate as to race, while the record shows no countervailing factor in the name of the common good which should be deemed to limit petitioner's right of purchase. (Whether such right is constitutionally protectable or guaranteed is discussed *infra.*)

That a racial test is inadmissible to determine who shall be able to purchase a home, because placing an

---

[23] MATER ET MAGISTRA, *ibid.*, at 8.

[24] Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1793).

arbitrary limitation upon a human right, has long been the moral judgment of religious leaders of all faiths[25].

**II. The Right To Purchase a Home Without Discrimination on Account of Race Is a Liberty Protectable Under the Due Process of the Fourteenth Amendment.**

While reversal in favor of petitioners in this case may be based upon a finding of state action in the premises giving rise to operation of the equal protection clause, or even, as petitioners have also argued, with or without state action, upon a determination that Section 1982 of Title 42 of the Civil Rights Act of 1866, as reenacted in the Civil Rights Act of 1870, is a valid exercise of the power of Congress under Section 5 of the Fourteenth Amendment, it is believed that the Fourteenth Amendment provides another, even more obvious ground for reversal. That ground is that the refusal of respondents to sell to the petitioners constitutes a deprivation of liberty to the latter without due process of law. This ground appears valid even in the absence of applicable Congressional enforcement legislation.

1. It cannot be doubted that petitioners have been deprived of a "liberty" as that term is popularly un-

---

[25] The Catholic bishops of the United States, in a series of statements over the past quarter century, have condemned all forms of racial discrimination, including discrimination in housing. See, their corporate statements of November 11, 1942, ON VICTORY AND PEACE; November 11, 1943, ESSENTIALS OF A GOOD PEACE; November 13, 1958, DISCRIMINATION AND THE CHRISTIAN CONSCIENCE ("But discrimination based on the accidental fact of race or color, and as such injurious to human rights . . . cannot be reconciled with the truth that God has created all men with equal rights and equal dignity"; August 20, 1963, RACIAL HARMONY, November 17, 1963, BONDS OF UNION.

derstood and indeed of a liberty which, as noted *supra,* may be deemed fundamental. This Court has said:

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

*Shelley* v. *Kraemer,* 334 U.S. 1, 10 (1948). In other recent decisions this Court has strikingly recognized that a civil right is denied when persons are excluded, on account of their race, from the enjoyment of property. *Evans* v. *Newton,* 382 U.S. 296 (1966). In *Bolling* v. *Sharpe,* 347 U.S. 497 (1954) this Court held that racial segregation in public schools deprived the segregated Negro children there involved of liberty without due process of law under the Fourteenth Amendment. "Liberty under law," said the Court per Warren, C.J., "extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." 347 U.S. 497, 499. Denial of equal housing opportunity on account of race cannot be classified as any less a denial of liberty than denial of equal educational opportunity on account of race. If it be conceded *arguendo* that the deprivation of liberty in the instant case was caused by private action rather than by state action, the magnitude of the deprivation is in no wise lessened by that fact.

2. The lack of specific enforcement legislation should not be deemed fatal to Petitioners' claim of right under the due process clause. It is the duty of government

to afford protection of rights. *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), and the courts have power to apply principles of equity for the protection of rights where legislative expression is lacking. *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 740 (1944). For the same reason, equitable protection in the absence of statute could be afforded here even if solely private action were determined to exist, since the due process clause, while specifically condemning certain state action, is also declarative of rights which a court of equity should recognize and enforce.

3. Were this Court to declare that the right to purchase a home without discrimination as to race is a liberty protectable under the Fourteenth Amendment due process clause, it would provide a needed recognition of the nature of the right. This Court in *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954) said that equal protection of the laws is "a more explicit safeguard of prohibited unfairness than 'due process of law' ", adding to that these words: "But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." Thus this Court appeared to indicate in that case (involving racial discrimination in schooling) that the due process clause is properly invoked to protect against those discriminations which most offend the sense of justice by attacking the most fundamental of liberties. Application of the due process clause as the governing constitutional principle in this case, or as stating the equitable basis for relief of petitioners, would constitute the most emphatic recognition, in this day and place of the painful emergence of a whole people from an original condition of slavery, that racial discrimination in housing is an intolerable denial of fundamental justice.

**III. Freedom To Purchase a Home Without Discrimination on Account of Race Is a Fundamental Right of Citizens Guaranteed by the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment.**

Assuming that the right to purchase a home without discrimination as to race is a fundamental right, it is a right protected by the privileges and immunities clauses of the Fourth Article and the Fourteenth Amendment. In *Campbell* v. *Morris,* 3 Harr. & McHen. 535 (1797), one of the earliest interpretations of the privileges and immunities clause of Article IV, the Court of Appeals of Maryland held it to protect "personal rights", among these, the right to acquire property. In *Corfield* v. *Coryell,* 4 Wash. C.C. 371 (1825) the court stated that the term, "privileges and immunities of citizens of the several states", refers to those privileges and immunities 'which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." Among these the court listed "the right to acquire and possess property of every kind." This original meaning of this clause became effaced in *Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1868), in which the Supreme Court held that its guarantee was limited to those privileges and immunities which are accorded the citizens of a state into which one might go. It has been stated that this "triumph of parochialism over humanitarianism", as well as the long continuing disregard by slave-holding states of the "fundamental human right" meaning of the privileges and immunities clause of Article IV, was a prime factor leading to the adoption of the privileges and immunities clause of the Fourteenth Amendment[26].

[26] For support of the "fundamental right" concept of the clauses see Antieau, PAUL'S PERVERTED PRIVILEGES OR THE TRUE MEANING OF THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE FOUR, 9 W. & M.L.R. 1 (1967).

It is submitted that the two clauses should be deemed identical in what they are intended to protect, and that no sound reason exists upon which to base an interpretation of either as not reaching fundamental human rights the protection of which was the original intendment of the privileges and immunities concept.

**IV. Freedom To Purchase a House Without Discrimination on Account of Race Is a Fundamental Right Within the Meaning of the Ninth Amendment.**

This Court has recognized liberties nowhere specifically enumerated in the Constitution. Recent among these have been rights of privacy[27] and of travel[28]. As Justice Goldberg (joined by Chief Justice Warren and Justice Brennan), in his concurring opinion in *Griswold* v. *Connecticut,* stated:

> ". . . [T]he Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments."

*Griswold* v. *Connecticut,* 381 U.S. 479, 493 (1965).

Should this Court conclude that, for one reason or another, the bases for relief of petitioners elsewhere set forth in this and in the petitioners' brief are un-

---

[27] Griswold v. Connecticut, 381 U.S. 479 (1965).

[28] Kent v. Dulles, 357 U.S. 116 (1958).

acceptable, relief should be deemed open to them through the gateway of the Ninth Amendment. A fundamental right is plainly here involved, one not specifically "enumerated" in the Constitution and one undeniably "retained by the people."

**V. The Freedom To Purchase a Home Without Discrimination on Account of Race Is Protected Under the Thirteenth Amendment.**

The Thirteenth Amendment states that neither slavery nor involuntary servitude shall exist within the United States. This reaches both governmental conduct and private conduct. *Clyatt* v. *United States,* 197 U.S. 207 (1904). Whereas, implementing legislation exists in Section 1982 of Title 42 of the Civil Rights Act of 1866, none is needed since the ban of the Amendment is self-executing. *Civil Rights Cases,* 109 U.S. 3, 20, 23 (1883).

In *Plessy* v. *Ferguson,* 163 U.S. 537 (1896) the Thirteenth Amendment was construed to abolish solely bondage, or enforced personal service, and not "separate but equal" travel accommodations for Negroes and whites. The majority opinion in that case stated that "a statute which implies merely a legal distinction between the white and colored races . . . cannot be justly regarded as imposing any badge of slavery or servitude . . ." *Id.* at 541. The Court then, in turning to discussion of the Fourteenth Amendment, expanded upon what it considered reasonable legal distinctions between the white and colored races: among these, the then existing, widely accepted miscegenation laws and racial segregation in education. Just as the "separate but equal" doctrine of *Plessy* has now been rejected by this Court *Brown* v. *Board of Education,* 347 U.S. 483

(1954), so ought its narrow definition of "slavery", as that term is employed in the Thirteenth Amendment.

The Court was not unanimous in *Plessy* v. *Ferguson,* Justice Harlan, in dissent, saying:

> "The 13th Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institutions of slavery as previously existing in the United States, *but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude."* (Emphasis supplied.)

163 U.S. 537, 555. This view of Justice Harlan finds ample support in the legislative history of the Thirteenth Amendment. In the debate over the Freedmen's Bureau Bill (which was intended to enforce the Thirteenth Amendment), Senator Trumbull, prime sponsor both of the bill and of the Thirteenth Amendment, said that the Amendment reached beyond the precise condition of bondage known as slavery:

> "With the destruction of slavery necessarily follows the destruction of the incidents to slavery.
>
> . . .
>
> "Those laws that prevented the colored man going from home, that did not allow him to buy or sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery."

39th Cong., 1st Sess. (Jan. 19, 1866) S. p. 322. Trumbull added:

> "I have no doubt that under this provision of the Constitution we may destroy all these vestiges of discriminations in civil rights against the black man. . ."

*Ibid.* Senator Howard, in the debate on 1866 Civil Rights Bill (based upon the Thirteenth Amendment) stated that the Amendment reached "the right or privilege of earning and purchasing property." 39th Cong., 1st Sess. (Jan. 20, 1866) S. p. 504. Trumbull quoted Carl Schurz as warning that abolition of slavery (in the narrow sense) would be rendered meaningless if the freedman, due to continued discriminations, were to become "the salve of society." 39th Cong., 1st Sess. (Feb. 1, 1866) H. p. 589. One notable form of discrimination imposed under the post-bellum Black Codes was discrimination in housing, several Southern state laws prohibiting Negroes from buying or leasing homes.[29] The Civil Rights Act of 1866 constituted recognition by the Congress that such discrimination is inherently part of the term, "slavery", as that term is employed in the Thirteenth Amendment.[30]

The *amici curiae* submit that the narrow interpretation of "slavery", as given in *Plessy* v. *Ferguson,* should now be abandoned for the broad interpretation of the term as undoubtedly comprehended by the framers of the Thirteenth Amendment and as expressed by Justice Harlan. Certainly, no other description of racial discrimination (whether public or private) in housing is as accurate as the description of it as a "badge of slavery." The great bulk of this discrimination in the United States has had no other origin than

---

[29] See remarks of Representative Windom, 39th Cong., 1st Sess., March 2, 1866, H. p. 1159.

[30] In United States v. Morris, 125 F. 322 (1903), it was held that Congress has the power, by virtue of the Thirteenth Amendment, to protect citizens in "the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of those privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that Amendment." 125 F. 322, 330.

an origin in the institution of slavery, while the color of skin as the visible sign denominating who was free and who was slave continues to this hour as the visible sign all too frequently denominating who may purchase a home and who may not.

In urging this interpretation, the *amici curiae* again stress the fundamental right here involved and the necessity today for the fullest vindication of the dignity of human person, freed of every badge, incident or vestige of slavery.

## CONCLUSION

It is submitted that the decision of the United States Court of Appeals for the Eighth Circuit was in error and that this Court should reverse the judgment below.

Respectfully submitted,

WILLIAM B. BALL
212 State Street
Harrisburg, Pennsylvania
*Counsel for the National Catholic Conference for Interracial Justice, George J. Gottwald, Lawrence Cardinal Shehan, Patrick Cardinal O'Boyle, Floyd L. Begin, William G. Connare, Hugh A. Donohoe, John A. Donovan, Joseph A. Durick, Raymond J. Gallagher, Paul J. Hallinan, Charles H. Helmsing, Joseph H. Hodges, Robert E. Lucey, John J. Maguire, Joseph M. Marling, Joseph McShea, Russell J. McVinney, John L. Morkovsky, Victor J. Reed, John J. Russell, Fulton J. Sheen, Ernest L. Unterkoefler, Ignatius J. Strecker, and John J. Wright,* as amici curiae.

January 1968